

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA

v.

PEDRO PENA

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\* 15-CR-188-01-JD

\* April 13, 2016

\* 11:00 a.m.

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TRANSCRIPT OF SENTENCING HEARING  
BEFORE THE HONORABLE JOSEPH A. DICLERICO

APPEARANCES:

For the Government: Jennifer C. Davis, AUSA  
U.S. Attorney's Office

For the Defendant: Eduardo Masferrer, Esq.  
Masferrer & Associates, PC

Probation: Riaka McCormick

Court Reporter: Susan M. Bateman, LCR, RPR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603) 225-1453

1 P R O C E E D I N G S

2 THE CLERK: The Court has before it for  
3 consideration this morning a sentencing in criminal case  
4 15-188-01-JD, United States of America versus Pedro Pena.

5 THE COURT: All right. Good morning.

6 MS. DAVIS: Good morning, your Honor.

7 MR. MASFERRER: Good morning.

8 THE COURT: The Court has a presentence  
9 investigation report before it. Have you had a chance to  
10 review that with your client?

11 MR. MASFERRER: I have, your Honor. Thank you.

12 THE COURT: Are there any exceptions or objections  
13 that you would like to take up?

14 MR. MASFERRER: There are none, your Honor.

15 THE COURT: All right. That being the case, the  
16 Court accepts the factual findings and the guideline  
17 applications contained in the presentence investigation  
18 report. That results in a total offense level of 19, a  
19 Criminal History Category of I, yielding a guideline range of  
20 30 to 37 months.

21 Does the government have a recommendation?

22 MS. DAVIS: We do, your Honor. The government  
23 recommends a low-end term of imprisonment of 30 months.

24 THE COURT: And what's the basis for the  
25 government's recommendation?

1 MS. DAVIS: Your Honor, the basis for the  
2 government's recommendation is that a term of imprisonment of  
3 30 months satisfies the sentencing goals enumerated in 18  
4 U.S.C. 3553(a). Particularly, it will provide just  
5 punishment for the offense, promote respect for the law, and  
6 will also provide general and specific deterrence.

7 I think in the context of what this district is  
8 facing today in terms of the opiate and heroin epidemic  
9 general deterrence takes on greater importance than perhaps  
10 it had in the past in the context of heroin cases, because to  
11 impose lenient sentences now would send such a message to  
12 those trafficking in those substances that the risk of  
13 committing the crime is worth it because the reward would be  
14 a less than severe sentence.

15 And given what is happening in this district with  
16 the importation of heroin from sources of supply from  
17 Lawrence, Massachusetts, such as in this case, the Court  
18 needs to send a stern message that it will not tolerate such  
19 drug trafficking.

20 A 30-month sentence will also be in accord with the  
21 length of sentences that the Court hands down for similarly  
22 situated defendants and will not result in a sentencing  
23 disparity. And it also is not so severe as to fail to  
24 recognize that upon completion of his term of imprisonment  
25 the defendant is likely under any circumstances to be

1 deported back to the Dominican Republic given that the  
2 instant offense is an aggravated felony.

3 Thank you, your Honor.

4 THE COURT: All right. Thank you.

5 MR. MASFERRER: Thank you, your Honor.

6 Judge, we've submitted a sentencing memorandum with  
7 some letters and photographs from the family.

8 We are asking the Court to consider imposing a  
9 sentence a little below the recommended sentence. We're  
10 asking for a sentence not to exceed 24 months.

11 As I'm sure the Court has read in the sentencing  
12 memorandum, and as the Court can see here today, Mr. Pena has  
13 a wide variety of support.

14 He has for all intents and purposes grown up in the  
15 United States. He came here at the age of 14. He went to  
16 high school in Massachusetts, graduated, and was gainfully  
17 employed in asbestos removal for over a decade. And it  
18 wasn't until the last two or three years that he made some  
19 poor choices in his life, poor choices in Massachusetts and  
20 poor choices here in New Hampshire, that resulted in his  
21 commission of the offense.

22 I've spoken at length to Mr. Pena, and certainly to  
23 his family who is here. I know that if your Honor gives him  
24 an opportunity you will hear from him.

25 He's very remorseful and regretful. He has no one

1 to blame for his mistakes but himself. He was raised right.  
2 He grew up with a strong, positive family, realizes the shame  
3 that he's brought upon himself and upon them, and has been  
4 emotional this morning seeing the amount of support through  
5 those letters and their appearing here.

6 The question for the Court is, is 30 months  
7 necessary in order to achieve a punishment for Mr. Pena. I  
8 would submit to the Court it's not an unreasonable sentence,  
9 but certainly a 24-month sentence I would submit to the Court  
10 is more reasonable.

11 Number one, it incarcerates Mr. Pena. He's been  
12 incarcerated for about 13 months I think as of today. A  
13 24-month sentence still leaves him with an additional year or  
14 so to do on his sentence. That's going to be away from  
15 family. He won't be anywhere local where they can see him  
16 with any regularity, and it imposes a loss of liberty. For  
17 someone who has been working, who has children, who has a  
18 family, any loss of liberty is significant, and certainly  
19 another year in incarceration is significant for Mr. Pena.

20 It brings along with it the consequence of  
21 deportation. Any sentence your Honor would impose would  
22 create that consequence, but for Mr. Pena it presents some  
23 unusual challenges. He's not somebody who has only been here  
24 two or three years and therefore has lots of job  
25 opportunities and contacts and just got here and decided to

1 start committing crimes. He's somebody who was raised here;  
2 somebody who has lived here; somebody who has established  
3 every familial route practically here.

4 And it will be difficult for him to go to the  
5 Dominican Republic and start anew, start looking for jobs,  
6 start trying to support his children and his family there.  
7 It's going to be a challenge for him to do that.

8 He won't be able to ever reenter the United States,  
9 not in a lawful sense of the word, because as an aggravated  
10 felon convicted of a drug conviction he's not eligible for  
11 any return.

12 If he were to reenter illegally, and Mr. Pena and I  
13 have discussed this, he's very aware that he would be facing  
14 reentry charges. He would be looking at a five-year federal  
15 prison sentence on top of the time he does here for  
16 reentering. That's not something he plans to do, and that's  
17 not something his family certainly plans to accommodate.

18 So the consequences to him are not just  
19 incarceration. It's deportation. It's loss of family. A  
20 more permanent loss in terms of being away from them on any  
21 sort of a regular basis.

22 We asked for the reduction in sentence -- I think  
23 primarily in my head 24 months is a sufficient sentence, but  
24 additionally we would point out that as a non-U.S. citizen  
25 his prison sentence -- his incarceration conditions tend to

1 work out in a much harsher way to him. And so what we're  
2 asking for is not for him to receive a benefit for being a  
3 non-U.S. citizen but rather to balance out those facts.

4 The Court can see that during the time period that  
5 Mr. Pena has been at the Strafford County jail he has been  
6 very proactive, not just as a painter, to the point that the  
7 deputy superintendent wrote a letter commenting on how  
8 helpful and trustworthy he is, but also taking courses and  
9 classes to improve himself, to find ways to better his mind,  
10 to find ways to better his future.

11 None of that will be available to him in a federal  
12 facility. And it's not as a specific punishment. It's that  
13 the federal facility has limited means and limited programs  
14 so their priority goes to people who are going be re-released  
15 within the United States. Those are the individuals who are  
16 eligible for the halfway house program. Those are the  
17 individuals who become eligible for any sort of program, from  
18 residential drug treatment, which is not Mr. Pena's goal, but  
19 even mental health or counseling or classes. All of that is  
20 very limited under the Bureau of Prisons current financial  
21 situation.

22 And so really Mr. Pena, a very intelligent man who  
23 has been striving to better himself given his circumstances,  
24 is about to enter into a prison condition where there will be  
25 nothing offered to him. No matter how much he wants to or

1 tries or how much good behavior he demonstrates, because of  
2 those things he'll be limited to really not being able to do  
3 anything to improve himself or rehabilitate in any way.

4 And so that does create more of a challenge for an  
5 individual. Sitting in a jail is hard enough as it is, but  
6 sitting in a jail where you're not even able to be productive  
7 in any significant way does weigh on individuals in a  
8 different way than when you're in programs or participating.

9 And so we're asking the Court to consider again a  
10 24-month sentence instead of a 30-month sentence as a way of  
11 ameliorating that specific condition for Mr. Pena.

12 Of course he's going to be deported at the end of  
13 it. So at the end of his federal sentence he'll spend some  
14 period of time in immigration custody as they work out that  
15 process of finalizing his removal from the United States.  
16 There's always going to be that sort of unknown amount of  
17 time that he'll be spending in detention awaiting his  
18 removal.

19 Beyond that, Judge, I think you can see from the  
20 letters in terms of a very specific -- you know, the man you  
21 have in front of you very specifically, they speak of him  
22 very highly. The family was very surprised. Some -- a lot  
23 of the family members were very surprised when they found out  
24 that Mr. Pena engaged in this type of conduct. That wasn't  
25 the person they had seen or known.



1 I think it's a testament to the fact that they're  
2 still willing to come up here. Some of them came up from New  
3 York City, some from Massachusetts. All were here very early  
4 this morning to show their support for him.

5 So on behalf of them, on behalf of Mr. Pena, I  
6 would ask the Court to consider respectfully a 24-month  
7 sentence. We feel that sentence is sufficient to punish him,  
8 sends a message to the community that you will be  
9 incarcerated and will be deported if you engage in this type  
10 of conduct, and yet allows Mr. Pena to find some hope to  
11 renew his life again.

12 Thank you, your Honor.

13 THE COURT: Well, while deportation is a factor  
14 that is to be weighed and considered, the weight that is to  
15 be given to that varies according to the circumstances.

16 MR. MASFERRER: Yes, your Honor.

17 THE COURT: The more serious the offense, the less  
18 weight may be given to deportation. It's sort of a sliding  
19 scale.

20 MR. MASFERRER: It is, Judge. I think that -- I  
21 understand that. I think -- when you look at that sort of  
22 sliding scale, I think it's more than just the weight of the  
23 seriousness.

24 Certainly I'm sure the Court sees individuals who  
25 have not been present in the United States very long, and so

1 deportation isn't the same consequence as somebody who came  
2 here as a child. Certainly where you have one or two family  
3 members here, but the bulk of your family is in the Dominican  
4 Republic. But you came here as an adult so you have  
5 contacts.

6           Deportation, while not a criminal punishment, the  
7 consequence weighs more heavily on the defendant in a  
8 circumstance like this where he has long-standing ties in the  
9 United States, the bulk of his family is in the United  
10 States, all his job and future employment possibilities are  
11 in the United States, and all of that will be permanently  
12 taken away from him.

13           And then how the Court weighs that given everything  
14 else obviously is on your Honor, and that's why we suggested  
15 that six-month departure, or variance as the Court would like  
16 to see it, because it still imposes a significant punishment  
17 on Mr. Pena. It doesn't reward him in any way, but it takes  
18 into account that his time spent in jail from this point  
19 forward soon won't be as productive and will feel harsher on  
20 him psychologically than the conditions that he's been in up  
21 to this point.

22           Thank you, your Honor.

23           THE COURT: All right. Thank you.

24           Mr. Pena, is there anything that you would like to  
25 say to the Court before the Court acts on this matter?

1           THE DEFENDANT: There's not much I really want to  
2 say. I was just going to tell you that I came to the United  
3 States when I was 14 years old. I had that opportunity. I  
4 just took the wrong choice in the last two years.

5           I have a beautiful family. They're the best family  
6 in the world. As you can see, I have a lot of friends. I  
7 think I'm a changed man, but I just want to say sorry to my  
8 family. Thank you.

9           MR. MASFERRER: Thank you, your Honor.

10          THE COURT: Thank you.

11          (Pause.)

12          Please stand, Mr. Pena.

13          The Court will read the sentence, and if either  
14 counsel has a legal objection you can tell me what this is  
15 when I finish.

16          Pursuant to the Sentencing Reform Act of 1984, it  
17 is the judgment of the Court that the defendant, Pedro Pena,  
18 is hereby committed to the custody of the Bureau of Prisons  
19 to be imprisoned for a term of 30 months.

20          Upon release from imprisonment the defendant shall  
21 be placed on supervised release for a term of three years.

22          Within 72 hours of release from the custody of the  
23 Bureau of Prisons the defendant shall report in person to the  
24 probation office in the district to which the defendant is  
25 released.

1           While on supervised release the defendant shall not  
2     commit another federal, state, or local crime, shall comply  
3     with the standard conditions that have been adopted by this  
4     Court, and shall comply with the mandatory and proposed  
5     special conditions attached to the presentence report.

6           It is ordered that the defendant shall pay to the  
7     United States a special assessment of \$100, which shall be  
8     due in full immediately.

9           The Court finds that the defendant does not have  
10    the ability to pay a fine and waives the fine in this case.

11          The defendant is remanded to the custody of the  
12    United States Marshal.

13          Does the government have any legal objection to  
14    this sentence?

15          MS. DAVIS: We do not, your Honor.

16          THE COURT: Any legal objection?

17          MR. MASFERRER: No, your Honor. Thank you.

18          THE COURT: Mr. Pena, it's my obligation to inform  
19    you that to the extent that there are any issues that can be  
20    appealed you do have a right to appeal this sentence to the  
21    United States Court of Appeals in Boston. That appeal must  
22    be taken within 14 days of when judgment is entered. And if  
23    you cannot afford the costs of an appeal or an attorney on  
24    appeal, then those will be provided for you.

25          The Court has considered the applicable guidelines

1 and the sentencing factors in imposing this sentence. The  
2 Court has taken into account the government's recommendation  
3 and your counsel's recommendation of 24 months.

4 The unlawful distribution of heroin is a very  
5 serious offense which is aggravated in this case by the  
6 amount involved. We're talking about 300 grams. Heroin has  
7 become an insidious epidemic which is affecting the lives of  
8 many people in disastrous ways, including death.

9 Therefore, a sentence of incarceration of  
10 appropriate length is necessary in order to punish you for  
11 this offense, in order to deter you and others from  
12 committing similar offenses, in order to promote respect for  
13 the law, and to protect society.

14 The Court has also considered your lack of any  
15 prior criminal record. The Court has considered the fact  
16 that you will in all likelihood be deported, and that in all  
17 probability you will not be allowed to return to the United  
18 States. These are obviously very serious consequences.

19 The Court has also considered the fact that during  
20 your pretrial detention that you have participated in a  
21 variety of programs very constructively, and for that you are  
22 to be commended, and you have held a position as a trustee  
23 doing painting work, and the Court has also considered your  
24 other personal characteristics.

25 The fact that you are going to be deported under

1 your circumstances where you've been in this country for a  
2 number of years was considered by the Court, as I said a  
3 minute ago, because quite frankly the Court was considering a  
4 sentence of 36 months in this case. So I have weighed that  
5 in this sentencing process.


6 The Court will be in recess.

7 (Conclusion of hearing at 11:20 a.m.)  
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## C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 7-20-16

  
**SUSAN M. BATEMAN, LCR, RPR, CRR**  
LICENSED COURT REPORTER, NO. 34  
STATE OF NEW HAMPSHIRE